

**The relationship between the international
and the municipal legal order: Reflections on the
decision no 238/2014 of the Italian Constitutional Court**

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1. By decision no 238/2014,¹ the Italian Constitutional Court (Consulta) declared that the customary rule on jurisdictional immunities of States, as ascertained by the judgment of the International Court of Justice (ICJ) in the case *Germany v Italy* (2012),² and also the implementation of this judgment itself in the Italian legal order, would be unconstitutional. It would be contrary to fundamental principles of the Constitution, such as the right to a judge (Article 24) and the basic rights of persons (Article 2), which cannot in any manner be displaced. This unconstitutionality flows therefore ultimately from a balancing-up process. The customary international rule and the judgment of the ICJ would entail, if implemented in the Italian legal order, a ‘complete sacrifice’ of the rights of the individuals, which would have to yield completely to the immunity-rule. This is a highly disproportionate result. The Court thus affirmed that the international norms at stake – ie the jurisdictional immunities as interpreted by the ICJ and the judgment of the ICJ – cannot be received in the Italian legal order to the extent that they conflict with principles and rights of ‘inviolable’ nature. The consequence is that these international norms cannot be applied in the Italian legal order (mainly paragraph 3(4)). We may notice that: *i*) the Court reasoned

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¹ Judgment no 238/2014, English translation provided by the Italian Constitutional Court <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>.

² *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* (Judgment) [2012] ICJ Rep 99.



solely from the standpoint of the Italian legal order; it completely left apart the international legal order, on which the Court does not feel allowed to express; *ii*) the solution of the Court boils down to robust dualism, one legal order being wholly independent from the other; *iii*) the Court engaged in a balancing-up process of ‘immunities *vs* human rights’; the ICJ had considered this process to be contrary to the applicable rule of international law, but the Italian judge now considers it necessary under Italian constitutional law. Finally, the Court seems to continue to breed the hope that its decision could influence international practice in the sense of a restriction of the rule on immunity, as had been achieved at the beginning of the 20th century with the distinction *acta jure imperii* and *acta jure gestionis* (see paragraph 3(3)). On this latter point, the Italian judges remain however, for the time being, isolated.

2. The gist of decision no 238/2014 is a separatist treatment of the two legal orders involved. It is a high peak of a new form of robust dualism. Dualism is here not limited to explain the penetration of international legal norms into the national legal order. It ventures further, extending to a denial of any constructive ‘dialogue’ with international law and the judgment of the ICJ. If implemented, this decision will give rise to a shattering schism between internal and international law, the former being pitched against the second in trying to sterilize its effect. We may notice that this ‘high-peak’ dualism is but one episode in a more general tendency to return to dualistically colored practices in the relationship between the legal orders. Thus, the European Court of Justice (ECJ) followed such a path in the famous *Kadi* case (2008),³ where it refused to defer to the legal order of the UN (including its Article 103 UN Charter) and held that it would fully control under the regional human rights standards the implementing legal acts of the EU with regard to binding SC resolutions. This led to a clash between the regional legal system (EU) and the universal one (UN), the former impeaching to some extent the functioning of the latter. But it must be confessed that

³ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008].



in this case the universal system was fraught with gravest defects as regards the right to a remedy against criminal charges.⁴ Even States traditionally favorable to international law and significantly open to its reception in the municipal legal order have witnessed a slight dualistic bent in their case law, as is the case in Germany.⁵ Finally, it may be noticed that even in the ‘perpetually’ monist Switzerland, a electorally potent right-wing party had requested already years ago a change of system towards dualism, in order to better fight back international law influences in municipal law.⁶ In the meantime, this party is about to launch a popular initiative whereby the Swiss people will have to vote to some degree of primacy of municipal law over international law – not exactly the same issue, but not a completely different one altogether.

3. The concepts of monism and dualism initially concerned only the question as to how international law could penetrate into (or be ‘received’ in) the municipal legal orders so as to be applied there. Since international law and municipal law are not identical (to wit: there are two words for designating each order), there must be a legal explanation as to why the internal judge or other operator will be able to apply a legal norm which is pedigreed in another legal order. For monistic explanations, municipal law and international law are part of a single greater legal order. They are but two different provinces of the same overall legal phenomenon. Apart from philosophical conceptions, the monistic construction rests on the point that international law is based on acts and facts of States and that it will become binding on a particular State essentially through its consent. Therefore, it is an outflow of the practice of the State itself and becomes a sort of ‘external constitutional law’ (at least when viewed in the perspective of the State). In this

⁴ On this precedent, see eg G De Burca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harvard Intl LJ* 1; see also the contributions in (2008) 91 *Rivista di diritto internazionale* 1075 ff and in (2009) 28 *YB Eur L* 593 ff.

⁵ See already BVerfG, Decision of 14 October 2004, in (2004) 57 *Neue Juristische Wochenschrift* 3407, para 34; and the decision of the BVerfG of 8 May 2007, reprinted in (2007) 60 *Neue Juristische Wochenschrift* 2610.

⁶ See (1998) 8 *Revue Suisse de Droit International et de Droit Européen* 635 and (2001) 11 *Revue Suisse de Droit International et de Droit Européen* 583.



perspective, it cannot be seen as a foreign legal order since it is nourished and will be binding only on account of acts of the State itself. That State participated in the creation of the international norm through its constitutional action. Thus the norms created will be somewhere part of 'its law'. The consequence is that international law is automatically part of the internal legal order and can be applied by all its organs without any further ado. This generates a system of 'general introduction' of international law in the municipal systems, according to some rule such as: 'international law is part of the law of the land'. Dualistic conceptions stress the opposite fact of separation of legal orders. International and municipal law are said to be different as to the subjects (States / individuals), as to the sources (agreements / legislation) as to the functioning (no nullity of the internal norm contrary to an international norm), as to the fundamental norms on which they rest (*pacta sunt servanda* or some international community on the one hand, the constituent power of one people on the other hand). The consequence is that each legal order determines for itself its legal acts and facts, and does so in complete independence from the other. Thus, international law cannot be applied in municipal law unless and until the internal legislator has transformed the international law norm into a norm of municipal law. The system is consequently based on a 'special introduction' model, according to some rule such as: 'the legislator decides what rules of international law shall apply, and how, in internal law'.

4. There are some general noticeable features of the two competing doctrines and practices, monism and dualism:

i) dualism is upheld essentially for written law (treaties). It is unpractical and thus not applied to customary international law. Unwritten rules cannot be 'transformed' by a piece of legislation. Moreover, they remain moving the whole time according to shifts of international practice. However, the inadequacy of dualism for such unwritten rules is hidden by the fact that customary rules rarely apply to internal legal relationships. Where they are applicable, as is the case in diplomatic law, multilateral treaties take the forefront and eclipse the unwritten rules (in the case of diplomatic law, the multilateral treaty applying is the Vienna Convention on Diplomatic Relations of 1961);



ii) monism is friendly to a close cooperation between the legal systems. It is geared towards a large and smooth reception of international law in municipal law by eliminating possible obstacles. Conversely, dualism is protective of State sovereignty. It allows national Parliaments to have a second thought on whether to concede municipal application and in what terms. It thereby provokes a greater occurrence of cases of violations of international law, notably by the fact that the latter is not correctly, or not at all, implemented on the municipal plane. The consequence is that the State will incur responsibility for the violation of international law. It will therefore be under a duty to make reparation. If there is the jurisdiction of an international tribunal, this State may be condemned to a *restitutio in integrum*. The judgment may then oblige the internal legislator to act in the sense it first wanted to avoid, by yielding to the international obligation. Alternatively, if the internal legislator remains stubborn, this will conduct to a situation of prolonged conflict of the legal obligations under the two different legal orders;

iii) international law allows both systems, it being precisely understood that dualistic States would have to assume international responsibility for the breaches of international law they commit by reason of their dualistic approach. International law thus recognizes the constitutional autonomy of States. It does not require that they adopt the system which is most sympathetic to its own functioning (monism);

iv) finally, as already said, dualistic and monistic approaches have since a certain time moved beyond the mere question of how international law is introduced into internal law. The issue is now colored by a hoist of questions of the relation between the legal orders, where 'isolationistic' and 'egocentric' approaches will be termed dualist and 'integrative' or 'community' approaches will be labelled as monist. This may be the case, for example, with regard to the rank recognized to norms of international law in the municipal system; or, else, with regard to the degree internal tribunals will be able to apply, or to apply directly (self-executory issues) norms of international law; or generally with regard to the degree of closeness or distance of the municipal system to the international one. Any tendency of separation will be branded as a hallmark of dualism, any sign towards cooperation or merger will be hailed as a progress of monism. Or the reverse: dualism hailed and monism discredited.



5. On the basic issue (and not on concrete implementations) of the two approaches, monism and dualism, there is no definite and final answer, since that is fundamentally a matter of perspective. It must be confessed that neither approach completely and thus adequately depicts reality. It would be wrong to consider that international law and internal law are simply 'one' legal system (but only extreme monists went that far). Both are separate legal systems (as their names indicate); each one is based on its own norm-creating agencies and organs. But this does not militate for dualism. To wit, it is true also in a federal State that federal law and cantonal law are and remain separate – sometimes even sharply, when certain remedies to the Federal Tribunal are limited to grievances against cantonal law. Yet, there is no doubt that federal and cantonal law are but part of one legal system, the Swiss one. The fact that municipal norms contrary to international law are not treated as being void is also no argument against monism. Cantonal norms contrary to federal law are not simply void; federal legislation contrary to the Constitution is not simply void (and in most cases cannot be voided at all); etc. But this is not an argument for refusing to see cantonal and federal law as parts of one legal system, the Swiss one. On many accounts, the dualistic proposition goes consequently too far. It treats international law as a foreign legal order as would be, for example, the legal order of France for Italy, and vice versa. However, this is an inadequate starting point. In the context of a foreign legal order, a State has not been involved at any level of the normative process of law-creation. This fact explains that the respective legal order remains completely alien one to the other and their relationships regulated by private international law (which is dualism in its pure form). The same cannot be said for international law. Considering the treaties, which is the source of international law where the monism / dualism theorems are relevant, it is only the consent of the State, expressed in the prescribed forms of constitutional law, which usually creates the international legal bond. The State thus not only participates in the creation of that norm, it even participates in the most intense fashion, ie by expressing its consent or by withholding its consent. Considering the matter from this point of vantage, international law cannot be completely separated from the internal legal order. The reality lies therefore in between dualism and monism. It is perhaps best captured by a form of 'moderate monism' or of 'moderate dualism', but the former term seems more adequate to us. Interac-

tion can be a limited one according to as many shades as wished. Conversely, separation can hardly explain interaction – since there is then not true separation! However, this is at the end of the day a matter of words and conceptualization. The gist of the matter is that the two systems must interact and dialogue one with the other. It has to be understood that international law is an incomplete legal order: it is there to produce some norms but not to ensure itself their implementation; this latter matter is referred to the States. A significant number of its norms are made to be implemented by the States in their municipal law. International law lacks its own organs to implement them. It does not have such organs because it is based on the recognition of the sovereignty of States. However, since there is such a sharing of work between the international legal order and the municipal legal order, it stands to reason that both must be based on an intense web of interaction, lest international law be deprived of its efficacy and in the ultimate analysis of its binding force. In the latter case, international cooperation would become impossible or extremely burdensome, at the very time when it has become most indispensable.

6. Considering now the decision no 238/2014, we notice that the separation of the legal orders is pushed to its paroxysm. There is not a separation but a divorce of municipal and international law; the point is indeed one of radicalized or high-peak dualism. The point is not simply that a *formal* procedure has to be followed for inserting international law norms into municipal law (classical dualism) – such a procedure had indeed been implemented by Italy in the present case, and consequently the relevant international law norms were dualistically inserted into that legal order. The point is rather that according to the reading of the Constitutional Court even if a norm has been formally introduced by the legislator in the internal legal order, it will not have truly landed there to the extent that it is contrary to a series of *material* principles of the Constitution as interpreted by the Court itself. A norm of international law will ‘land’ in municipal law not only if it is transformed, but also if it complies with a series of material norms of the internal legal order. This robust or double dualism leads to a sort of murder of international law through municipal law. The rule of international law whereby international law prevails over municipal law (see already the



Alabama arbitration of 1872 and the *Montijo* case of 1875, the latter on the primacy of international law on the State Constitutions; or else Article 27 of the Vienna Convention on the Law of Treaties), and which thus also requires a State to adapt its internal law to international law and not the opposite, is deprived of its proper reach. Thus, one reads in the *Montijo* arbitration: '[A] treaty is superior to the constitution, which has to give way. The legislation of the Republic must be adapted to the treaty, not the treaty to the laws'.⁷ It is true that this rule of absolute primacy applies only in the inter-State level and is not applicable in municipal law. There the States may give priority to their municipal law while assuming international responsibility for the breach of international law. However, if dualism is pushed to the point it was brought by the Constitutional Court, with its double formal and material layers, the opposition of the legal orders becomes fierce and permits hardly any conciliatory avenues. There will then be political and power struggles for ensuring the primacy of one of the orders. The solution will thus largely be devised on an extra-legal plane. Consider the schizophrenic point: Italy is bound to implement the ruling of the ICJ (which the Constitutional Court does not deny); but any means to do so have been rendered unavailable, since the Constitution seems to command that claims against Germany be admitted by municipal tribunals (any wholesale exclusion of them being unconstitutional). This is then a Cornelian Drama.

7. The versed reader may think to have spotted a way out of the quagmire. The Italian constituent power would have to change the Constitution itself, in order to insert there, instead of a simple law, the obligation to abide by the relevant immunity rule and the judgment of the ICJ. But – apart from the fact that this would be a lengthy procedure and no retroactivity could be ensured for the time the new provision is not in force – the Constitutional Court seems to have ruled out that possibility by declaring that the fundamental principles of Articles 2 and 24 of the Constitution are also material limits to the revision of the Constitution. In paragraph 3(2) one reads: '[T]hey stand for the

⁷ H La Fontaine, *Pasicrisie internationale, 1794-1900* (Imprimerie Stampelli & CIE 1902) 217.

qualifying fundamental elements of the constitutional order. As such, they fall outside the scope of constitutional review'.⁸ In ultimate analysis, the Court consequently condemns Italy to become unable *sine die* and possibly *seacula seaculorum* to implement the ICJ judgment. The 'dualism' unveils as having become triple: formal, material and eternal. This may then be termed a sort of judicial putsch. The requirements of internal law shall 'eternally' (but without Apocalypse now!) prevail over those of international law. Italy shall remain in constant breach of its international obligations. How Italy will do to implement its international obligations does not seem the matter of the Court. Neither that the performance of these obligations remain legally possible. It stands to reason that this is at best a curious conception of the relationships between two legally binding legal orders. Internal law is placed in effect above international law. International is not any more fully binding on the State, or better: it remains binding but is entirely non-executable. The category of a binding but non-executable obligation is an odd legal monster. The damage to international justice, and to the ICJ, is manifest. Why should States take on themselves to litigate in front of the ICJ, with all time and expenditure this entails, if the losing State may brandish more or less insolently its municipal law in order not to implement the judgment? Is such a reading of dualism not tantamount to jeopardize international law's overall and practical chance to be implemented? How could international anarchy be avoided, if municipal law prevails up to the point of a new 'eternal' sterilization of the international legal order? This remarkable approach gives some justification to the arguments of some famous monists, as H Kelsen or M Bourquin. These authors claimed that in case of normative contradiction, the dualistic method leads to the equal but separate validity of different norms. It makes therefore any legal solution impossible.⁹ In short terms, it can be said that what international *jus cogens* could not achieve, ie to displace jurisdictional immunities, the municipal law of a State managed to perform, at least in its own sphere of application. It is not certain, to say

⁸ Judgment no 238 (n 1) para 3.2.

⁹ See eg M Bourquin, 'Règles générales du droit de la paix'(1931-I) 35 Recueil des Cours de l'Académie de Droit International 140-141; H Kelsen, 'Théorie générale du droit international public' (1953-II) 84 Recueil des Cours de l'Académie de Droit International 185.



the least, that the Italian Constitutional Court took the full measure of what it was doing and unleashing.

8. The (non-)choices of the Italian government are now extremely delicate. That government is confronted to a harsh collision of incompatible legal obligations: *i*) on the one hand, the obligation to respect the Italian Constitution as interpreted by the Constitutional Court; *ii*) and on the other hand, the obligation to honor Italy's international obligations in the context of jurisdictional immunities and of the implementation of the ICJ judgment. Ultimately, the government will have to choose which obligation it wants to heed. But that also entails that it will violate the other obligation. In this awkward context, it could invoke the rule of 'primacy of international law', to which it is bound as regards other States. It would then sacrifice the Constitution, at least as interpreted by the Constitutional Court. This course would allow to avoid a continuous violation of an international obligation. Indeed, if the opposite choice was preferred, Italy would be in (continuous) violation of its international obligations as against Germany. Under the principles of State responsibility, Italy would be bound to provide a full reparation to Germany for all the damages the latter would suffer by the non-respect of its immunity. The absurd consequence would then be the following: Italy would have to compensate Germany for all the sums of money to which Germany would be condemned as against the war crimes-claimants, and also for all expenditure. At the end of the day, the compensation for the crimes suffered would therefore be paid by Italy and not by Germany; ie by the Italian taxpayer and not by the German taxpayer. If Italy refused to compensate Germany, the latter State could bring Italy to the ICJ and have it condemned again. It could thereafter also take some counter-measures, if Italy refused to implement the judgment. Moreover, there would be a lasting impairment of the relations between two important States of the EU. These consequences projected in the long run are so grave and onerous, that it is simply unimaginable to give the priority to municipal law. If there is any practical choice to be made in the context of the conflict as presented, the constitutional norm must yield. The decision no 238/2014 will then have done much more harm than it will have done good to the authority of the Constitution. (It is also possible to check to what extent some 'necessi-

ty'-clause can be marshaled to find a path out of the quagmire, but this is an issue of municipal constitutional law into which the present author is hardly competent to venture). However, it has to be conceded that even if the preceding were true and practically possible, the Government would have no direct influence on the decisions of the courts (separation of powers). It could not decide to impose a particular interpretation on the *Tribunale di Firenze*. It is therefore the latter which would have to ignore the ruling of the Constitutional Court, which is hardly imaginable on more than one account. Overall, the Italian judges will therefore ride their country into an almost intractable situation.

9. There were certainly other ways by which the Constitutional Court could have tried to conciliate – if that was its main aim – the ‘rights’ of the Italian victims with the holdings of the ICJ. Thus, for example, the Italian State could have been requested to try to find other ways to insure some degree of reparations, eg through negotiated lump sum-agreements, a path the ICJ had already suggested. There is never immunity under international law in the context of direct negotiating contacts between States. Italy could also have brought a claim to the ICJ with regard to the substance of the dispute, ie the right of reparations of its citizens (but it must be confessed that the Italian government never wanted to venture into such grounds). Could the Constitutional Court have nevertheless recalled this option? It would have shown at least that a ‘complete sacrifice’ of the rights of the individuals was not necessarily at stake even while accepting the international obligations as ascertained by the ICJ. There would also have been the possibility to consider that the Italian State could create itself a fund for reparation, and later possibly approach Germany for asking whether it was ready to make some gracious contributions. In short terms, the Court could have analyzed more carefully the applicable international obligation (instead of ignoring it altogether by affirming that it had no authority to examine it) so as to see whether it left some implementation-leeway for the Italian State – and if not, as was the case here, elect to venture into some alternative avenues of reasoning, which would have conciliated the two sets of obligations, municipal and international. This was emphatically not done: only the municipal obligation was considered, the international obligation cast into a legal limbo worse than purgatory. The end



result is odd. This is not a matter of great surprise in view of the hermetic approach followed.

10. Perhaps some constitutional judges who have voted for the decision no 238/2014 would start to consider the matter under a fresh perspective if the question was not posed any more in terms of compensation for Italian citizens having suffered crimes by the German Nazi régime, but if many Albanians, Serbs, Greeks and especially Libyans and Ethiopians brought compensation claims against Italy for war crimes suffered from deeds of the Fascist troops. Is it necessary to recall that Italy even went as far as to use lethal gases in its warfare in Ethiopia?¹⁰ It remains a matter of speculation why smart solicitors have not yet discovered this promising and potentially so lucrative perspective. Some Italian judges would then be confronted with their own deeds in a boomeranging perspective. If access to court and individual compensation claims are *jus cogens*, Italy could not even escape from the grim perspective of thousands of procedures by concluding a lump sum-agreement. Indeed, any single right-holder would indeed have a right to veto that agreement and to claim its nullity under international *jus cogens*, as provided for in Article 53 of the Vienna Convention on the Law of Treaties. By the same token, many Italian assets could possibly be seized in some other States wherever in the world, if the latter followed the legal logic of the Italian Constitutional Court or applied some '*doctrina de los actos propios*' (ie applied to Italy the law some Italian Courts claims to be applicable). *Tout bien pesé*, this is neither a bright nor simply a practicable solution. Overall, there is one good aspect of decision no 238/2014: it opens up a debate on a highly interesting question and we may all the more expect with trepidation the further developments in this legal-political saga.

¹⁰ See M Junod, *Le troisième combattant* (Payot 1947) 9 ff.

